UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

DOLGENCORP, LLC **Employer,** **and** **UNITED FOOD AND COMMERCIAL WORKERS LOCAL 655** **Union.**	**Case No. 14-RC-209845**

DOLGENCORP, LLC'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND CERTIFICATION OF REPRESENTATION

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Dolgencorp, LLC ("Dollar General" or the "Employer"), submits this Brief in Support of Its Request for Review of the Regional Director's Decision and Certification of Representation, pursuant to National Labor Relations Board ("NLRB" or the "Board") Rules and Regulations § 102.69(c)(2).

I. INTRODUCTION

Contrary to the overwhelming evidence in support of Dollar General's exceptions to the election held on December 8, 2017, the Acting Regional Director in her March 23, 2018, Decision and Certification of Representation ("Decision" or "RD Decision")[1] incorrectly found that neither the Union nor Adam Price engaged in objectionable conduct that interfered with the employees' right to choose freely in the election – seemingly "rubberstamping" the Hearing Officer's report.

The Hearing Officer[2] had erroneously found that Mr. Price was not an agent of the United Food and Commercial Workers, Local 655 ("UFCW" or the "Union") despite the record evidence demonstrating that he: (1) initiated the organizing drive; (2) introduced the Union's business agent to the employees; (3) was responsible for distributing and collecting bargaining surveys two days before the election; and (4) was perceived to be the lead union organizer by the employees of the Auxvasse store (as the un-contradicted testimony from two witnesses establishes). The Hearing Officer also blatantly ignored that the Union and its business agent, Billy Myers ("Myers"), were largely absent during the critical period. Mr. Myers visited Auxvasse, Missouri, on only three separate instances: first, to collect authorization cards on November 13, 2017; second, to meet with some employees the week of November 28; and

[1] The Decision was issued by Acting Regional Director, Mary J. Tobey (hereinafter "Regional Director"). A copy of that Decision is attached hereto at Exhibit A.

[2] A copy of the Hearing Officer's Report on Objections, dated February 8, 2018, is attached hereto at Exhibit B.

finally, to attend the election on December 8. In the Union's absence, it was left to Mr. Price to lead the Union's organizing drive throughout the critical period.

Even assuming that both the Regional Director and the Hearing Officer correctly held that Mr. Price was not a Union agent – which he was – the Regional Director misapplied the Board's standard for determining whether third-party conduct warrants setting aside an election. Mr. Price's threatening, intimidating, and coercive conduct towards employees inhibited their free choice in the election. Mr. Price threatened that he would slash the tires of any employee who voted "no" and made repeated attempts to bribe an employee to vote in favor of the Union. The record was sufficiently clear (and largely uncontested) that throughout the election period, Mr. Price engaged in threatening, coercing, and intimidating behavior to such an extent that members of the small bargaining unit of only six eligible voters subjectively and objectively were not offered a free and fair election.

Furthermore, the Regional Director blindly accepted the Hearing Officer's numerous critical errors in his findings of fact, incorrectly crediting the testimony of the Union's witnesses despite clear evidence to the contrary. As explained in greater factual detail below, the Regional Director failed to critically evaluate the Hearing Officer's recommendations, give due consideration to crucial evidence, and compounded the Hearing Officer's errors, by accepting and sustaining a number of blatantly erroneous factual findings that were clearly contrary to the evidence adduced on the record.

The Regional Director further failed to address the totality of the circumstances surrounding the election and Mr. Price's and the Union's objectionable conduct – including a complete disregard of the closeness of the vote, the size of the bargaining unit, and the relevant impact of these factors. Although the Regional Director suggested she, "carefully scrutinized the

objections raised by the Employer and considered the closeness of the election results and the size of the bargaining unit [],” she failed to properly discuss or analyze such evidence or give any indication that she gave any meaningful consideration to these factors. RD Decision, at 7.

The Union won the vote with a 4-2 majority voting in favor of union representation. A *single* vote swing would have been enough to overturn the results of the election. The Board has repeatedly held that the closeness of a vote is a factor to take into consideration when determining whether objectionable conduct has interfered with an election, such that the results should be set aside. Both the Board and Courts have held that when an election is close, the Board must examine the alleged objectionable conduct with heightened scrutiny. The Regional Director failed to do so in this case.

The Regional Director also failed to take into account the small size of the voting unit in assessing the misconduct at issue. When analyzing the impact of threatening and coercive conduct, the Board has held that the small size of a voting unit weighs in favor of overturning the results of the election. The detrimental effect of such conduct on the laboratory conditions necessary to hold a free and fair election is magnified within the context of a small voting unit. Because the size of the voting group in Auxvasse was clearly so small (only six eligible voters) the Regional Director, like the Hearing Officer, failed to give this factor the consideration mandated by both the Board and the federal courts and failed to appropriately scrutinize the misconduct at issue and its impact on the small voting unit.

As demonstrated below, the Board should set aside the results of the election and direct a rerun election.

II. STATEMENT OF THE CASE

A. Background and Procedural History.

The Union filed a petition for an election on or about November 14, 2017, seeking to represent a unit of Sales Associates and Lead Sales Associates employed at Dollar General's facility located in Auxvasse, Missouri. A Board-supervised election was held on December 8, 2017, and the Union won by a 4-2 margin where a single vote swing would have changed the results. On December 14, 2017, the Employer filed timely exceptions to the election and a hearing was held before Hearing Officer John Kelly Holderman on January 3, 2018, at Region 14 in St. Louis, Missouri. On February 1, 2018, the Regional Director ordered that the hearing be re-opened to receive evidence demonstrating that Union witness Adam Price engaged in witness tampering and intimidation based on his conduct during the January 3 hearing.

B. The Hearing Officer's Decision.

The Hearing Officer issued his Report on Objections ("Report") on February 8, 2018. According to the Report, the Hearing Officer purported to rely on the entire record evidence, the demeanor of the witnesses, and extant Board law to conclude that neither the Union nor Mr. Price – either as an agent of the Union or as a third-party – engaged in impermissible conduct that required setting aside the election. Therefore, the Hearing Officer recommended that the Employer's exceptions be overruled and that a certification of results be issued. *See* Report at 15. As demonstrated in Dollar General's exceptions, however, the Hearing Officer failed to apply appropriate Board law, misconstrued or ignored record evidence, and made a number of flawed witness credibility determinations. Dollar General timely filed exceptions to the Hearing Officer's Report on Objections with the Regional Director on February 22, 2018.

C. The Regional Director's Decision

Echoing the Hearing Officer's recommendation, the Regional Director issued her Decision and Certification of Representation on March 23, 2018. Finding Price was not an Agent of the Union, the Regional Director incorrectly focused on the conduct of Myers, not Price. In reaching the conclusion that Price was not an Agent of the Union, the Regional Director relied on a single "group chat" and the fact that Myers appeared in person a total of *three times* during the entire campaign and election period. Of those three visits, Myers visited "***once during the critical period***." RD Decision, at 4 (emphasis added). Not only is this clear evidence of the Union's limited involvement throughout the entire organizing campaign, but the Decision failed to adequately consider *Price's own conduct*, in evaluating whether he acted as an agent of the Union.

III. ARGUMENT

A. Board Review of the Regional Director's Decision is Appropriate Here.

By statute, the Board maintains the power to review "any action of a regional director." 29 U.S.C. § 153(b). Though the Board may empower Regional Directors to oversee representation elections, the terms of the delegation authorized under the Act provide that no Regional Director's actions are ever final on their own; they only become final if the parties decide not to seek Board review or if the Board leaves those actions undisturbed. *UC Health*, 360 NLRB No. 71 (2014), *enfd*. 803 F.3d 669, 671 (D.C. Cir. 2015). "Simply stated, the Board has not delegated 'final, plenary authority' to its regional directors." *Hosp. of Barstow, Inc*., 364 NLRB No. 52 (July 15, 2016).

According to the Board's Rules and Regulations – Part 102, a request for review may be granted upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

See §102.67(d). Board review is appropriate here based on the Regional Director's failure to apply applicable law concerning the agency status of Price (which Dollar General argues Price was) and failure to properly consider Price's conduct even as a third party. Board review is further necessary based on the multiple erroneous findings of the Regional Director on substantial factual issues, which prejudicially affect the rights of Dollar General.

B. Adam Price's Conduct, Whether as an Agent of the Union or as a Third Party, Warranted Setting Aside the Election.

As a threshold matter, both the Regional Director and the Hearing Officer erred in their application of the law and conclusion that Adam Price was not an "agent" of the Union. To the extent that Mr. Price's conduct is involved in any of the objections, he was acting as the Union's agent. Because the Regional Director failed at the outset to correctly find that Mr. Price was an agent of the UFCW based on relevant legal principles, the Regional Director's decision is fundamentally and fatally flawed. But, even assuming that Mr. Price was not an agent of the Union, the Regional Director nonetheless erroneously held that his conduct did not warrant setting aside the election under the Board's third-party conduct standard.

1. The Regional Director failed to correctly apply the Board's standard of proof for determining agency status.

The Regional Director failed to consider Price's specific conduct in concluding he was not an agent of the Union. Dollar General put forward several compelling reasons as to why Price should be considered an agent of the Union. *See* RD Decision, at 1-2. Yet, the Regional Director's Decision focuses on only one of those arguments – that *Myers* was largely absent during the campaign – focusing solely on Myers.

The Hearing Officer's opinion also begins with the faulty premise that Mr. Price is not an agent of the Union. That Report fails to consider Board law and wholly ignores evidence adduced at the hearing that fully satisfies the Board's standard for finding agency status. Generally, the Board applies the principles of agency for determining whether a lead organizing employee acts as an agent of the labor organization during the organizing campaign. *See Corner Furniture Discount Ctr., Inc.*, 339 NLRB 1122 (2003). Once the Board finds that an employee was acting as an agent of the Union, the Board then evaluates that person's conduct by applying an objective standard. Under this standard, the employee's conduct is objectionable if it has "the tendency to interfere with the employees' freedom of choice." *Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004) (citing *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995)). In deciding whether such interference has occurred under this standard, the Board considers the following nine factors:

(1) The number of incidents of misconduct;

(2) The severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit;

(3) The number of employees in the bargaining unit subjected to the misconduct;

(4) The proximity of the misconduct to the election date;

(5) The degree of persistence of the misconduct in the minds of the bargaining unit employees;

(6) The extent of dissemination of the misconduct among bargaining unit employees;

(7) The effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct;

(8) The closeness of the final vote; and

(9) The degree to which the misconduct can be attributed to the party.

Applying the test above to any or all of Mr. Price's conduct, the only reasonable outcome would have been to overturn the results of the election: the threat was severe and likely to cause fear among employees because it threatened substantial property damage; although it subjected one employee in the voting unit to the misconduct, the voting unit is sufficiently small with six voters such that dissemination[3] is likely and that one vote alone would have changed the results of the election; the statement occurred proximate in time to the election, occurring about one to two weeks before the election; Ms. Jennifer Miles testified that the threat remained in her mind and specifically she did not know what Mr. Price was capable of doing (Tr. at 61:7-10, 63 9-11); Dollar General did not engage in *any alleged or actual misconduct* thereby cancelling out the threat; the closeness of the final vote revealed that the Union won by a 4-2 margin such that a swing of one vote would have changed the results; and, for the reasons described below, the conduct is attributable to the Union because Mr. Price was held out as, acted as, and was perceived as the lead Union organizer. [4]

[3] Ms. Miles told the remaining members of the voting unit about Price's comment. Tr. 35:6-9, 47:21-25.

[4] The National Labor Relations Act ("Act") is clear: "[i]n determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified *shall not be controlling*." §2(13) (emphasis added).

In *Macomb Pottery*, the Administrative Law Judge found that a lead employee organizer was an agent of the union during an organizing campaign. It made no difference that the employee-agent was "never so connected with or *given such authority*" by the Union. *Local 340, International Brotherhood of Operative Potters, (Macomb Pottery Co.),* 175 NLRB 756, 759-60 (1969) (emphasis added). What mattered for agency status was that the employee was an active union supporter, organized meetings, collected cards, initiated the campaign, and that the union was largely absent. *See also Bufkor-Pelzner Div., Inc.*, 197 NLRB 950 (1972) (citing *Macomb Pottery* and noting that finding an agency relationship between a union and employee is appropriate where the employee was "the prime contact between union officials and employees in a town where the union had no base of operations and which its officials seldom visit").

The Regional Director failed to consider the relevant case law presented by Dollar General. Instead, the Regional Director broadly stated "[t]he cases cited by the Employer are inapposite, as they involved employees with far more substantial agency indicia than are present in this case and union organizers with substantially less presence during the organizing campaign." RD Decision, at 4-5, *citing Macomb Pottery Co.*, 175 NLRB 756 (1969) and *NLRB v. Kentucky Tennessee Clay Co.*, 295 F.3d 436 (4th Cir. 2002). That is patently incorrect. The cases cited by Dollar General were substantially similar, if not identical, to the factual situation presented in the instant matter.

Contrary to the view of the Regional Director, this case is appropriately compared to *Kentucky Tennessee Clay Co.*, where the court imputed employees' threats to the Union. 295 F.3d 436, 442-43 (4th Cir. 2002). There the court found that the employees were "instrumental in every step of the campaign process"; one employee-agent initiated the organizing drive by contacting the union's agent, the employees distributed literature to the employees, and they

"spoke with eligible employees about the [u]nion both in the workplace and by telephone calls to their homes." *Id.* at 443. The Regional Director's assertion that the Union organizer, Myers, had "less presence during the organizing campaign" than the Union organizer in *Kentucky Tennessee* is simply incorrect. In *Kentucky Tennessee Clay*, the official union organizer held three meetings with the employees prior to filing the petition, three more meetings leading up to the week before the election, and then "one week before the scheduled election, [the Union organizer] checked into a motel room" for additional meetings where "[a]pproximately 15 to 20 employees" visited with him. *Id.* at 438-439. Yet, even with the Union organizer's overwhelming presence, the Court still found the employees to be "agents" of the Union. *Id.* at 443. The activities of Myers in this case were substantially more limited than in the Union organizer in *Kentucky Tennessee*. Myers visited Auxvasse only three times total, only one of which was during the critical period.

Macomb Pottery is also an appropriate comparison to the current case. There the Board found that the following conduct weighed in favor of agency status: the employee initiated "first contact" with the union, assisted with securing union authorization cards, and communicated with employees. *Macomb Pottery*, 175 NLRB at 759. Also weighing in favor of a finding of agency status was the union's notable absence and lack of physical presence during the organizing campaign. The Board further relied on the union vice president's infrequent visits to the Macomb plant and his limited, in-person contact with interested employees, which were "mainly by telephone or mail." *Id.* As a result, the Bound found that employee organizer was "a *de facto* agent of the [union]" for his role in the organizing drive, arranging union meetings, and other relations with employees. *Id.* (emphasis in original).

Again, contrary to the viewpoint of the Regional Director, in this case Price had indicia of agency status similar to the employees found to be agents in *Macomb Pottery,* and Myers was actually *more present* than the Union organizer in that case. In *McComb*, the Board held,

> That [the Union] official never appeared at the plant or even in Macomb ***during the early solicitation***, but operated there only through the two Waddells, Burton, and another worker. ***When International Vice President Hackett took over the drive late in 1964***, his contacts were mainly by telephone or mail with the Waddells and the other two workers; ***while he spent 4 to 5 days a month from September 1964, to the election on visits to Macomb***.

Id. at 759 (emphasis added). The Regional Director's argument that the cases cited by Dollar General nonetheless "involved employees with far more substantial agency indicia than are present in this case and union organizers with substantially less presence during the organizing campaign" clearly demonstrates her failure to give proper consideration to Dollar General's exceptions and unwarranted deference to the Hearing Officer's recommendations.

A correct application of *Macomb Pottery* and *Kentucky Tennessee Clay* reveals that Mr. Price was an agent of the Union and the Regional Director failed to undertake the appropriate analysis. Price initiated "first contact" with the Union, introduced the Union's business agent to the employees, was the primary point of contact, frequently communicated with the employees, was responsible for distributing and collecting collective bargaining surveys, and was perceived by employees as the primary and lead union organizer. These facts are underscored by the UFCW's material absence throughout the organizing campaign, which left Mr. Price to do the "heavy lifting." Tr. at 119:21-120:1; 148:15-19; 148:25-149:1; 149:16-151:10; 162:23-24; 163:5-7. In fact, Mr. Myers visited Auxvasse only three times; first, on November 13 when he teamed with Mr. Price to collect authorization cards, second, on the week of November 28 after returning from vacation, when he met with a small group of employees at a local Denny's restaurant, and third, on the day of the vote held on December 8. Tr. at 159:6-160:25. In light of

these facts, and contrary to the Regional Director's finding. Mr. Price acted as and was perceived as the "lead" organizer and the legal face of the Union. *See* Tr. at 119:21-120:1 ("Q: Was there anybody among your co-workers who would have been viewed as the lead Union supporter? A: Adam. Q: Do you think everybody perceived him that way? A: Yes, sir.").

The Regional Director clearly misapplied Board law and incorrectly found that Mr. Price was not an agent of the Union. There was no dispute that he was the lead organizer (Tr. at 119-120); that he initiated the campaign by calling the Union business agent Billy Myers (Tr. 148-149); that Mr. Myers instructed Mr. Price to "talk to his coworkers and see if there's interest," (Tr. 148-149); Mr. Price accompanied Mr. Myers to meet with *every other interested employee* to solicit authorization cards, (Tr. at 150-151); and was responsible for talking to employees and soliciting their opinions about what they wanted in a collective bargaining agreement and then reporting back to Mr. Myers, (Tr. at 162-163). Mr. Price's agency status is further confirmed by Mr. Myers' absence from Auxvasse during the organizing campaign. Other than November 13, the day Myers and Price solicited cards, and December 8, 2018, the day of the election, Mr. Myers visited Auxvasse *once* during the critical period. These facts and circumstances demonstrate that Mr. Price was unquestionably the face of the Union during the organizing campaign and the Union's agent. Accordingly, his actions and objectionable conduct are attributable to the Union.

2. The Regional Director erroneously found that Mr. Price's conduct did not meet the Board's third-party standard.

Even assuming Mr. Price was not an agent of the union – which Dollar General disputes – under the Board's third party conduct standard, his conduct was sufficiently threatening, coercive, and intimidating to destroy the employees' free choice and materially tainted the results of the election. The Board applies two different standards for determining whether third-party

threats or non-threatening but coercive conduct warrant setting aside an election. In the case of threats by third-parties, the Board examines whether the threat rises to the level of objectionable conduct where they are "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). In assessing the seriousness of such threats, the Board considers five factors:

(1) The nature of the threat itself;

(2) Whether the threat encompassed the entire bargaining unit;

(3) Whether reports of the threat were widely disseminated within the unit;

(4) Whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and,

(5) Whether the threat was rejuvenated at or near the time of the election.

In third-party cases not involving threats, the Board will overturn election results where the conduct at issue so "substantially impaired the employees' exercise of free choice as to require that the election be set aside." *Independence Residence, Inc.*, 355 NLRB 724 (2010); *Hollingsworth Management Serv.*, 342 NLRB 556, 558 (2004). In *Tio Pepe, Inc.*, the Board upheld the decision of an Administrative Law Judge ("ALJ") and directed a second election where third-party employees – not acting as agents of the union – promised other employees in the voting unit a financial benefit if the union won the election. 263 NLRB 1165, 1165 n.4 (1982). Importantly, it mattered not "whether [the employees] are supervisors . . . or rank-and-file employees"; what mattered for the Board was that the employees "made offers of financial benefit in exchange for union support and so engaged in objectionable conduct requiring that the results of the election be set aside." *Id.*

Here, the Regional Director, like the Hearing Officer, failed to apply the Board's correct legal standard with respect to the threat to slash tires [Objection #1] or to the $100 bribe [Objection #2]. Instead, and as explained below with the specific objections, the Regional Director simply and mechanically rubberstamped the Hearing Officer's reliance on flawed credibility determinations and factually erroneous findings unsupported by the record. In applying either standard, however, Mr. Price's illegal conduct warrants overturning the results of the election.

a. The threat to slash the tires of any employee who voted "no" warrants setting aside the election.

Mr. Price engaged in objectionable conduct – while he was at Ms. Miles' house at a party for employees who had signed union authorization cards – when he threatened to slash the tires of any employee who planned on voting "no" to union representation. *See* Employer Ex. 3; Tr. at 62:23-25. This threat satisfies the *Westwood Horizons* test and should result in the election being overturned.

First, the nature of the threat itself involved serious property damage to employees' vehicles. *See PPG Indus., Inc.*, 350 NLRB 225, 225 (2007) (pro-union supporters yelling to other employees that they would "break out your windshield, slash your tires, stone your f—ing car, [and] kick you[r] ass"). Second, the threat to slash the tires of "*anyone* [who] decides to vote 'no' instead of 'yes'" was a threat that "encompassed the entire unit." Tr. at 61:7-9 (emphasis added); Employer Ex. 3. Mr. Price's conduct also satisfies the fourth *Westwood Horizon's* factor because he was capable of carrying out the threat and Ms. Miles testified that the threat affected her vote because of "the fear that he may . . . do that kind of damage to my property or somebody else's . . . [and] wondering what else he may be capable of, as well." Tr. at 63:9-11. Finally, under the last *Westwood Horizon's* factor, a threat need not be rejuvenated

when it occurs so close in time to the election. *See Manorcare of Kingston PA, LLC*, 823 F.3d 81 (D.C. Cir. 2016) ("[T]here was no need for 'rejuvenation' in this case because the threats occurred for the first time in close proximity to the election."). While not rejuvenated, the threat was made near the time of the election and Ms. Miles unequivocally testified that it affected and influenced her vote.[5] *See* Tr. at 63:1-11.

b. Mr. Price's $100 inducement in exchange for Ms. Durlin's "yes" vote for the Union substantially impaired the employees' free choice.

There is no factual dispute that Mr. Price offered Ms. Durlin $100. Tr. 177:1-2 ("I can help you with money. I can loan you $100 or whatever if that'll help you."). Mr. Price made that offer to secure Ms. Durlin's vote, either as a bribe to maintain her "yes" vote or to ensure that she remained employed at Dollar General long enough to vote. Thus, the offer "substantially impaired" the right to vote freely and warrants setting aside the election.

It makes no difference whether the offer or promise of financial benefit was made by an agent of one of the parties or an employee. In *Tio Pepe, Inc.*, the Board upheld the decision of an Administrative Law Judge ("ALJ") and directed a second election where third-party employees – not acting as agents of the employer or the union – promised other employees in the voting unit a financial benefit if the union won the election. 263 NLRB at 1165 n.4. The Board explained that "whether [the employees] are supervisors . . . or rank-and-file employees, [they] made offers of financial benefit in exchange for union support and so engaged in objectionable conduct requiring that the results of the election be set aside." *Id., see also NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 270 (1973) (reduction of initiation fee by Union interfered with employees' fair and free choice of a bargaining representative). Even so, the evidence on the record demonstrated

[5] As explained in Part III.B.1., *infra*, the Regional Director erroneously found, contrary to the evidence adduced at the hearing, that Mr. Price's threat occurred outside the critical period.

that Mr. Price unequivocally said to Ms. Durlin, "I'll give you $100 if you vote yes" – an offer which he repeated on multiple occasions. Tr. at 133:5-11. Two witnesses corroborated that the offer was meant as a way to secure Ms. Durlin's vote in the election, which Mr. Price assumed would be "yes." Tr. at 69:2-6; 133:5-11.

In addition to wrongly concluding that Mr. Price was not an agent of the Union, the Regional Director also misapplied the Board's applicable standard for third-parties engaging in threats or promises of inducements. As explained above, Mr. Price's conduct, even as a third party, warrants setting aside the election.

C. The Regional Director Erroneously Relied on the Hearing Officer's Recommendations, Which Was Based on Mistaken Facts and a Flawed Assessment of the Witnesses' Credibility.

Not only did the Regional Director misapply the law of agency and third-party standards as argued above, but also failed to properly weigh and consider the contradictory evidence and testimony in this matter. As recognized by the Regional Director, the Hearing Officer's credibility findings are not absolute and a "clear preponderance of all the relevant evidence" permits the reviewer to overturn the fact finder. RD Decision, at n.2, *citing Stretch-Tex Co.*, 118 NLRB 183 (1957).

The Hearing Officer's factual findings and credibility determinations for each objection are unsupported by the record and there is little doubt that the Hearing Officer's credibility assessments were fundamentally unsound. *See Harborside Healthcare Inc. v. NLRB*, 230 F.3d 206 (6th Cir. 2000) (remanding the case on the basis that the Board applied the wrong legal standard and improperly adopted the hearing officer's report which itself contained erroneous credibility determinations). As explained in further detail below, the Hearing Officer's

credibility and factual findings were based on misinterpreting the evidence and completely ignoring corroborated testimony.

1. Objection #1

Employer Objection #1 should be sustained because Mr. Price, either as a Union agent or a third-party, made a threat that destroyed the laboratory conditions necessary for a free and fair election. Ms. Miles testified that she agreed to host a small get-together at her home for "the people that had signed cards." Tr. at 62:1-2. While at Ms. Miles' home, Mr. Price threatened to slash the tires of any employee who "decides to vote no instead of yes." *See* Employer Ex. 3; Tr. at 61:7-10.

In accepting the Hearing Officer's recommendation that Objection 1 be overruled, the Regional Director explained that the statement, if made, was outside of the critical period between the filing of the petition and the election. RD Decision, at 5. The Regional Director based this decision on the Hearing Officer's erroneous findings. The Hearing Officer made this conclusion by "credit[ing] the testimony of Price over that of Miles" for "a variety of reasons." Report at 5. Accordingly, the Hearing Officer's conclusion that "cards were signed on November 8" and that a party for "card signers" occurred at "Miles' house [on] November 11." Report at 6.

These dates are based on an utter misreading of the record and are factually wrong. True, the party at Ms. Miles' home was a "coming together party for people that signed cards." *Id.*, *see also* Tr. at 62:1-2. However, the employees *did not* sign cards on November 8 nor did the party occur on November 11. The Regional Director's finding in this regard contradicts the testimony of Mr. Myers and the face of the Petition. *See* Board Ex. 1. Mr. Myers, the Union's witness and admitted agent, admits that he went to Auxvasse and collected signatures with Mr. Price from the

employees *on November 13*. On cross examination, Employer's counsel and Mr. Myers engaged in the following exchange:

> Q: If I represented that to you? Okay. So between November 14th and the date of the election, December 8th, you -- aside from the day you were there for the vote, you visited once?
>
> A: Twice, the first time -- if I filed on the 14th, you said, right?
>
> Q: You filed on the 14th.
>
> A: Then *I met up with them on the* [November] *13th* because I filed the next day.

Tr. at 160:6-13 (emphasis added). It is undisputed that the Union filed the petition on November 14, 2017. *See* Board Ex. 1. Additional testimony confirmed that November 13, 2017, was the card signing date:

> Q: So, let me ask you a question. You indicated that you only met Billy at your house or Billy had only been to your house that one time. Is that correct?
>
> A: Yes, ma'am.
>
> Q: And that was right on the frontend of the organizing campaign. Am I correct?
>
> A: Yes, ma'am.
>
> Q: It was the day you signed your card?
>
> A: Yes, ma'am.

Tr. at 127:16-24. The Hearing Officer's finding that "cards were signed on November 8" directly contradicts the record and is clearly wrong based on each of the following: (1) it is undisputed that the petition was filed on November 14th; (2) Mr. Myers' testimony that he filed the petition *the day after* he met with the employees; and (3) Ms. Durlin's testimony that Billy (the Union organizer) had only been at her house once and that day is the day she signed the card. *Supra*, s*ee also,* Report at 6. How the Hearing Officer found the authorization cards "were signed on November 8" is entirely unsupported by record and defies logic. The Regional

Director's acceptance of the Hearing Officer's erroneous conclusion, prejudiced Dollar General and necessitates Board review.

The party at Ms. Ms. Miles' house for "card signers" clearly occurred during the critical period --after the petition was filed on November 14. The Hearing Officer's, and thus the Regional Director's, decision and credibility finding to the contrary collapses under the weight of his own logic. The Hearing Officer concluded that "it would make more sense that a party for 'card signers' would happen *a few days after* cards were signed." Report at 6 (emphasis added). The Hearing Officer is correct that, logically, any party for "card signers" would happen "a few days after cards were signed." Because all cards were signed on November 13 when Mr. Myers went to Auxvasse for the first time, it would have been impossible for the party to occur any earlier than November 13, as the Hearing Officer suggests. Using the Hearing Officer's own logic, any party for "card signers" would happen "days after cards were signed" which would put the party, and the threat to slash tires, squarely within the critical period after the filing of the petition and before the election.

Further, the Hearing Officer's mistake further bolsters Ms. Miles' testimony. On December 9, 2017 – one day after the vote – Ms. Miles contemporaneously wrote a statement that explained that "[b]efore the vote (roughly a week or so before) Adam had made a statement, saying, 'If anyone decides to vote no instead of yes, I will slash their tires.'" Employer Ex. 3. She confirmed this testimony at the hearing on January 3, 2018, when she testified that the party had occurred one to two weeks prior to the vote, placing the date of the party at her house on or between November 24 and December 1. *See* Tr. at 84:23-85:1. Because any party of card signers would have logically occurred "after cards were signed" (which according to Mr. Myers was on November 13), it makes much more sense that the event at Ms. Miles' home occurred on

or about November 24 rather than November 11 – two days before Mr. Myers *ever* visited Auxvasse.

Because the hearing record unequivocally demonstrates that the threat to slash tires was made *within* the critical period, the threat warrants setting aside the results of the election. This case bears nearly identical facts to the Board's decision in *Smithers Tire & Automotive Testing of Texas, Inc.*, 308 NLRB 72, 73 (1992), where the NLRB overturned the results of an election based on a threat by one employee (not found to be an agent of the Union) to another that he would "flatten the tires" of an employee if she voted against the Union. *Id.* at 73. In *Smithers*, the Board overturned the hearing officer, finding her reliance on *Westwood Horizon's* misplaced. *Id.* The Board held that "[i]n this regard, we note that her vote . . . could reverse the outcome of the election" and thus set aside the election. *Id.*

2. Objection #2

Employer Objection #2 should be sustained because Mr. Price offered a $100 bribe to Joanna Durlin in exchange for her "yes" vote. There is overwhelming evidence in the record that supports that the (1) offer was made (2) with the intention of influencing or securing Ms. Durlin's vote.

As a threshold matter, there is no dispute that Mr. Price offered Ms. Durlin $100. However, the parties disagree as to the purpose of the offer. The Union maintains that Mr. Price offered it as a "loan" to Ms. Durlin because she was struggling financially. Tr. at 177:1-2. Two witnesses, however, contradict Mr. Price. Ms. Durlin, in no uncertain terms, testified that "Adam had told me that he would pay me $100 for my 'yes' vote." Tr. at 117:18-19. Ms. Miles corroborated Ms. Durlin's version when she testified that Mr. Price had "mentioned to me on several occasions that he had told Joanna [Durlin] that he didn't want her to quit because she was

thinking about quitting the store, and that if she needed help, he would *give* her a $100, because *he said we needed her vote*." Tr. at 69:2-6 (emphases added). Regardless of Mr. Price's agency status, he made an offer of financial benefit to Ms. Durlin to ensure her "yes" vote for the Union. In *NLRB v. Savair Manufacturing Co.*, the Supreme Court found that a $10 offer of benefits during an election campaign was sufficient to affect the free choice of the employees. 414 U.S. 270, 278 (1973); see also, *Tio Pepe*, at 1165 n.4; *Crestwood Manor*, 234 NLRB 1097 (1978) (union promise to conduct $100 raffle if it won election); *Loubella Extendables, Inc*., 206 NLRB 183 (1973) (union's promise to forgive employees' previously accrued obligations to pay dues or initiation fees if union won election).

Even assuming that Mr. Price was a third-party, and not an agent of the Union, his $100 offer "substantially impaired" Ms. Durlin's and the employees' free choice under the relevant objective standard. Moreover, there is no factual dispute that the $100 offer actually influenced Ms. Durlin's vote in favor of the Union. *See* Tr. at 123:15-17 ("Q: Did that offer influence your vote? A: Yes, sir."). Consistent with Ms. Durlin's testimony, Ms. Miles testified that her impression was that Mr. Price made that offer because he "knew that [Ms. Durlin] was . . . stressed out . . . about the vote and the campaign and what not." Tr. at 120:24-103:5.

Further, the Hearing Officer made a number of faulty credibility determinations regarding Ms. Durlin's testimony, which the Regional Director again rubberstamped. First, whether Mr. Price made the $100 promise two or three times, Ms. Durlin's testimony was not "internally inconsistent," as the Hearing Officer suggested. The statement Ms. Durlin prepared on the day of the election, after the vote count, explained that "I was told multiple times I would be paid $100 for my vote . . . at the store and in my home." Employer Ex. 4. She confirmed this during her testimony:

Ms. Durlin: No, the second time he mentioned paying me the $100 was Thanksgiving night.

Hearing Officer: Okay.

Ms. Durlin: The time prior to that was at the store, and I don't know the date specifically to that.

Hearing Officer: So this was two times?

Ms. Durlin: Uh-huh.

Tr. at 123:1-7. It appears that the Hearing Officer is relying on Ms. Durlin's statement on cross-examination when she said as follows:

> [Adam] brought it up multiple times. The first time that he offered me the $100, I told him no. I'm a pretty prideful person, I like to do things on my own. But then he offered it to me again, that was at the store. And the second time was at my house, he had offered it. He's like, "I'll bring it to you tomorrow." I was like, okay, because it was right around Christmastime and I still wasn't getting help.

Tr. at 134:2-9. Ms. Durlin's testimony that "[t]he first time that he offered me the $100, I told him no . . . But then he offered it to me again, that was at the store" was part of the same event. At the store, Mr. Price offered the $100 bribe but, when Ms. Durlin refused, he again insisted. This reading of the record is entirely consistent with the second occurrence happening at her home on Thanksgiving Day. Tr. at 123:1-2.

Second, the Hearing Officer's adverse credibility finding against Ms. Durlin bordered on the absurd and it's quite telling that the Regional Director chose to ignore this fact entirely. The Hearing Officer's credibility determination was mere speculation and he manufactured reasons in an attempt to discredit Ms. Durlin's testimony. The Hearing Officer apparently found Ms. Durlin not credible because, "while [Ms. Durlin] did not cry while on the stand, she brought with her tissues almost as though she was prepared for it." Report at 8. This finding is simply bizarre and irrelevant. It is unclear why bringing tissues to the witness stand would undermine a

witness' testimony. Ms. Durlin could have brought tissues to the witness stand for any number of reasons, not the least of which is that she was frightened by Mr. Price as she was unsure of what to expect by him or the Union at the hearing. Ms. Durlin and Ms. Miles both clearly testified that they had been coerced, threatened, and were frightened by Mr. Price and the Union. It's not outside the realm of reasonableness to think they might need tissues for the hearing. Or, among other things, she could have simply been feeling sick on the day of the hearing or she could have been suffering from allergies. Ultimately, it has nothing to do with the issues that were before the Hearing Officer. Yet, for some unexplained reason, the hearing officer found this to be material to his findings and compounding the issue, the Regional Director plainly overlooked the issue.

The parties agree that Mr. Price made the offer of $100. It was undisputed that Mr. Price made the offer with the intention of securing Ms. Durlin's continued employment at the store and ultimately her vote in favor of the union. It is irrelevant whether he made it one time or several – the fact that he made the offer **at all** in an effort to influence the election is sufficient to find that the election results should be set aside. Additionally, whether the $100 is characterized as a *quid pro quo* in exchange for her "yes" vote, or as a financial inducement to get her to stay, the fact remains that Mr. Price offered the $100 bribe to ensure Ms. Durlin's perceived pro-union stance until she could vote. Mr. Price knew Ms. Durlin was a card signer and that if she left, it would be one less vote in favor of the Union –potentially the one vote needed to swing the election in favor of Dollar General.

3. Objection #3

Objection #3 should have likewise been sustained. At the outset of the Hearing Officer's analysis, he criticizes Ms. Durlin and Ms. Miles for "never t[elling] organizer Myers, or

employee Price, to stop texting them," that they "never attempted to block Myers' or Price's text," or that the "texts were unwanted." Report at 9. To that end, the Hearing Officer "would find this would be a necessary step in showing something to be harassing." *Id.* This kind of "victim-blaming" approach to harassment would require that the victim or object of harassment ask the harasser to stop. The Regional Director's failure to truly consider the harassment not only undermines Board policy, but undermines public policy.

Ms. Miles testified that, while the constant text messages were at first welcome, they had "become more of [a] nuisance to me" and that she felt "obligated" to respond. Not an unexpected response from someone who felt threatened, scared, and intimidated during the process. Tr. at 65:14-20. In a recent case, a unanimous panel of the Board rejected a similar approach taken by the Hearing Officer. In *International Longshoremen's Assn., Local 28 (Ceres Gulf, Inc.),* a unanimous panel of the Board reversed the decision of an Administrative Law Judge for discrediting a witness who complained of harassment because he found it "implausible" that she would have "meekly allowed" a union agent's to physically and sexually harass the complainant "a whopping 10 times, *without an utterance.*" 366 NLRB No. 20, slip op. at 3 (Feb. 20, 2018) (emphasis added). The Board remanded the case for a hearing de novo because the original ALJ had "relied on inappropriate bases to assess credibility and intertwined those bases with other legitimate considerations." *Id.* slip op. at 1.

In addition to the Hearing Officer's improper finding that Ms. Miles was required to "speak up" (and the Regional Director's failure to address it), her continued participation is entirely consistent with her testimony and her overall fear of retaliation, especially in light of Mr. Price's threat to slash the tires of co-workers who got out of line. As Ms. Miles testified at the hearing, she was concerned that Mr. Price would carry out the threat to slash the tires of anyone

who voted against the Union. Tr. at 63:1-11. In order to avoid any violence or retaliation from Mr. Price, Ms. Miles instead "kept up appearances" and continued participating in the group chat.

4. Objections #4, #5, #6, and #7

As explained above, the Regional Director's analysis and recommendations as to Objections #4 through #7, inclusive, hinge on her earlier finding that Mr. Price was not an agent of the Union but instead a third party. Because, the Regional Director failed to apply the Board's agency test, the findings in Objections #4 through #7, inclusive, are faulty and should be rejected in their entirety.

5. Objection #8

In addition to the above exceptions, the Regional Director, like the Hearing Officer, neglected to consider the totality of the circumstances that destroyed the laboratory conditions necessary to hold a free and fair election.

Notably, the Union won the election by a razor-thin margin in which a swing of a single vote would have changed the results. It is well-settled that the closeness of an election is an important factor in assessing whether conduct is objectionable, primarily because the Board requires heightened scrutiny in close elections. *Robert Orr-Sysco Food Servs.*, 338 NLRB 614, 615 (2002) (holding that the hearing officer "did not sufficiently take into consideration the closeness of the election results"); *Monmouth Med. Ctr. v. NLRB*, 604 F.2d 820, 823 n. 4 (3d Cir. 1979) (closer cases – in which one or two votes could have changed the results – merit "closer scrutiny"); *see also Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716, 716 (1995) (in 105-103 election, noting that "a switch of one vote…would have been decisive"). Nothing in the Report suggests that the Regional Director applied the requisite heightened scrutiny in this case.

Further, the Regional Director failed to duly consider the relatively small size of the bargaining unit. Given the closeness of the vote, and that the bargaining unit was comprised of only six eligible voters, there was a real risk of dissemination of Mr. Price's and the Union's objectionable conduct. *Kona 60 Minute Photo*, 277 NLRB 867 (1985) (finding that the seriousness of the unlawful organizing conduct was "further underscored by the small size of the unit" in a unit of only seven employees). Again, nothing in the report suggests that the Regional Director considered the small size of the voting unit.

D. The Hearing Officer Failed to Adequately Consider Mr. Price's Attempted Witness Tampering Which Undermines His Credibility – And the Regional Director Blindly Agreed.

As stated *ad nauseam*, the Regional Director blindly agreed with the Hearing Officer's Report. Yet, the Hearing Officer's analysis of Mr. Price's attempted tampering and intimidation during the first day of hearing is flawed because it confuses attempted tampering with a violation of the Hearing Officer's sequestration order.

It does not matter that Ms. Durlin did not change her testimony because of Mr. Price's comment. Rather, his statement that he would have access to the transcripts is consistent with his objectionable behavior during the campaign and further undermines his credibility. Making the statement alone is enough to discredit his testimony because evidence of witness tampering is a serious and potentially criminal offense. *See* 18 U.S.C. § 1512(b)(1). Federal law prohibits any person from attempting to "use[ ] intimidation, threaten[ ], or corruptly persuade [ ] another person" with the intent to "influence, delay, or prevent" testimony in an official proceeding. 18 U.S.C. § 1512(b)(1).

In *Hoyt Water Heater Co.*, 282 NLRB 1348, 1355-56 (1987), the ALJ in an unfair labor practice hearing found that the discriminatee lacked credibility because he intimidated a number of company witnesses at an unemployment insurance administrative hearing. While the

employer's witnesses were waiting for the commencement of the hearing, the discriminatee "took a camera out and took a picture of [four witnesses]." On another occasion, as one witness left the location of the hearing, the discriminatee followed him to his house, passed the witness in his car, and tried to force the witness to stop. The discriminatee claimed that it was just a coincidence and that he and the witness were simply going in the same direction. A third witness, while travelling home after an outing with his son, noticed the discriminatee tailgating his vehicle for about eight minutes. In light of the evidence of attempted witness intimidation, the ALJ discrediting the discriminatee's testimony.

Here, Mr. Price's conduct on the day of the hearing evinces a pattern of intimidating and coercive behavior that was consistent with his objectionable conduct during the organizing campaign. Accordingly, both the Regional Director and the Hearing Officer failed to consider this evidence of attempted tampering and weigh it against Mr. Price's credibility.

IV. CONCLUSION

For the foregoing reasons, Dollar General respectfully requests that contrary to the Regional Officer's decision, that Dollar General's objections should be sustained and the results of the December 8, 2017 election should be set aside and the election should be re-run in an atmosphere free from objectionable conduct.

/s/ Michael E. Lignowski

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Dated: April 13, 2018

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EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

Dolgencorp, LLC

Employer

and **Case 14-RC-209845**

United Food & Commercial Workers, Local 655

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulated Election Agreement, an election was conducted on December 8, 2017, in a unit of the Employer's Lead Sales Associates and Sales Associates at its retail store in Auxvasse, Missouri. The tally of ballots showed that of the approximately 6 eligible voters, 4 cast ballots for the Petitioner, and 2 cast ballots against representation. There were no challenged ballots. Therefore, the Petitioner received a majority of the votes.

The Employer timely filed 8 objections. On February 8, 2018, the Hearing Officer issued a report in which he recommended overruling the objections in their entirety. The Employer filed exceptions to the Hearing Officer's recommendations.

The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. I have considered the evidence and the arguments presented by the parties and, as discussed below, I agree with the Hearing Officer that all of the Employer's objections should be overruled. Accordingly, I am issuing a Certification of Representative.

I. THE OBJECTIONS

Much of the conduct objected to by the Employer was attributed to unit employee Adam Price, a Lead Sales Associate at the Auxvasse store. The Hearing Officer found that employee Adam Price was not an agent of the Petitioner and therefore evaluated his alleged objectionable conduct under the Board's third-party standard. In its exceptions to the Hearing Officer's recommendation to overrule Objections 1 through 7, the Employer contends that the Hearing Officer erred in finding that Adam Price was not acting as an agent of the Petitioner during the organizing campaign and erred in failing to apply the agency standard to Price's conduct. Because this threshold finding affects the analysis of Price's alleged conduct with respect to all of the objections, I will first address this issue.

Agency Status of Employee Price

The Employer argues that Price is an agent of the Petitioner because he "(1) initiated the organizing drive; (2) introduced the [Petitioner's] business agent to the employees; (3) was

responsible for distributing and collecting bargaining surveys two days before the election; and (4) was perceived to be the lead union organizer by the employees of the Auxvasse store..." The Employer also argues that the Petitioner and its representative, Organizing Director Billy Myers, were "largely absent" during the organizing campaign and this absence left the responsibility for organizing on employee Price. The Board "will not lightly find an employee 'in-plant organizer' to be a general agent of the union." *S. Lichtenberg & Co.*, 296 NLRB 1302, 1314 (1989). The burden of proving agency is on the party asserting it. *MasTec Direct TV,* 356 NLRB 809, 809 (2011); *Cornell Forge Co.*, 339 NLRB 733, 733 (2003). The Employer does not argue and the record contains no evidence that employee Price had actual authority to make the alleged objectionable statements attributed to him. Therefore, I find that Price was not an actual agent of the Petitioner. The Employer does contend that Price acted with apparent authority as an agent of the Petitioner and therefore the Petitioner is responsible for his alleged objectionable conduct.

In determining whether an employee is acting with apparent authority on behalf of an employer or union when the employee makes a particular statement or takes a particular action, the Board applies the common law principles of agency. See, e.g., *Cooper Industries*, 328 NLRB 145 (1999). "Apparent authority 'results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question.' *Corner Furniture Discount Center, Inc.*, 339 NLRB 1122, 1122 (2003). Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief." *MasTec Direct TV*, 356 NLRB at 809-10. Accordingly, two conditions must be met in order to establish apparent authority: (1) the principal must make some sort of manifestation to a third party; and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. See, e.g., *Millard Precision Services*, 304 NLRB 770, 771 (1991) (citing RST 2nd of Agency, § 8 (1958)).

The record reveals no manifestation by the Petitioner to the employees that would lead them to reasonably believe that Petitioner had authorized Price to make the statements attributed to him. Instead, it is clear from the uncontradicted evidence that the Petitioner did not hold Price out as having any special status during the critical period. After being contacted by Price and introduced to other interested employees, Organizer Billy Myers met with employees in person to solicit signatures on authorization cards. Thereafter, Myers maintained regular contact with employees via text messages, phone calls, and in-person visits. The group text messages between Myers, Price, employee Joanna Durlin and employee Jennifer Miles (the Group Chat)[1] introduced at hearing provide ample evidence that Organizer Myers was actively involved and clearly in charge of the organizing campaign:

[1] The fourth interested employee, Alan Bloom, was not included on this text message exchange because he did not have a cell phone. Myers attempted to maintain direct contact with him separately by phone.

Myers Answered Questions

- November 18, employee Durlin sent a text in the Group Chat asking, "Billy what does that mean they [the Employer] get to decide who votes?" (U Exh. 1, p.1).

Myers Solicited Volunteers to Engage in Various Activities Relating to the Campaign and Election

- On November 18, Organizer Myers sent a text in the Group Chat asking, "Are you guys keeping [up] with Alan and making sure he's standing solid with you all[?]" Employee Durlin responded, "I think Adam keeps up with Alan." Employee Miles responded, "I think Adam is, I don't know if he's had much to say to him tonight with this other Manager being in there right now." (U Exh. 1, pp. 8-9).
- On November 26, Myers sent a text message in the Group Chat asking, "Has anybody talked to the other two employees? Do you know what their thought process is when it comes [to] going Union?" Employee Miles responded, "I haven't seen them much[.]" (U Exh. 14, p. 14).
- On November 27, Myers sent a text message in the Group Chat stating, "I need one of you to volunteer to overlook (sic) the ballot box, that person will sit (sic) on the union side and the company will have one of your co-workers to sit on (sic) behalf of the company, this way no monkey business can be done with the votes..." Employee Miles volunteered and texted, "I don't mind watching the box." (U Exh. 1, p. 20).
- On December 6, after a group discussion regarding an Employer meeting, Myers sent a text message in the Group Chat stating, "My little group here rocks!! Hey Jen could you give me a call after the meeting and give me a heads up on what was said[?]" (U Exh. 30).

Myers Organized Group Meetings with Employees

- On November 18, Organizer Myers sent a text in the Group Chat stating, "If you guys could pick a date where in all four of you guys are off so we can meet up[,] grab something to eat and have a conversation." (U Exh. 1, p. 10).
- On November 26, Myers sent a text in the Group Chat stating, "Just checking in, how is everybody doing. I will be up your way tomorrow, what's your schedule like[.] I would like to sit down and visit with each of you if that's possible." (U Exh. 1, p. 13).
- On December 5, Myers sent a text in the Group Chat stating, "I apologize I did not get to make it there today, had a death in the family...I definitely will come up and see you all tomorrow."
- On December 6, employee Miles texted in the Group Chat, "Good morning everyone! Hopefully we can all get together today." Myers responded, "Good morning, that would

> be great if we can[.] I am bringing up a proposal survey. That way everybody could fill one out and we can get a jump start on exactly what's important to you all."

In addition to the Group Chat and other communication by phone, Myers visited the employees 3 times during the 25-day organizing campaign: once to obtain authorization cards, once during the critical period, and once on the date of the election. Myers also sent another organizer of the Petitioner to meet with employees during the critical period. These visits further establish that Myers, not Adams, was Petitioner's agent in charge of the organizing campaign and was the Petitioner's agent. Based on the evidence in the record as a whole, I agree with the Hearing Officer that the Employer has not met its burden to establish a manifestation by the Petitioner to the employees.

In addition, I agree with the Hearing Officer that the evidence fails to establish that any employee reasonably believed that Price had the authority of the Petitioner to make the statements attributed to him. Although Price distributed surveys to employees to fill out regarding their priorities during bargaining, employees knew this activity was merely ministerial; Myers explained the purpose of the survey. In arguing that employees viewed Price as an agent of the Petitioner, the Employer relies on the testimony of employee Durlin:

> Q: Was there anybody among your co-workers who would have been viewed as the lead Union supporter?
>
> A: Adam [Price].
>
> Q. Do you think everybody perceived him that way?
>
> A. Yes.
>
> (Tr. pp. 119-20.)

However, it is well settled that an asserting party does not establish an employee's agency status on the mere basis that the employee is engaged in "vocal and active union support." *United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988); *see also Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 296 (7th Cir. 1983). That employee Durlin saw Price as the "lead Union supporter" does not transform him into an agent of the Petitioner. *See Corner Furniture Discount Center,* 339 NLRB at 1123 (employee who organized and spoke at union campaign meetings, solicited authorization cards, and played a leading role in the campaign established only that the employee was a leading union supporter and was not sufficient to establish apparent agency).

The cases cited by the Employer are inapposite, as they involve employees with far more substantial agency indicia than are present in this case and union organizers with substantially

less presence during the organizing campaign. See *Kentucky Tennessee Clay Co.*, 295 F.3d 436, 443 (4th Cir. 2002) (Court found that "there was no evidence that [the organizer] or any other professional organizer ever obtained a single signature on an authorization card, attempted to visit the facility or to speak to employees on its outskirts, handed out a single pamphlet, or attempted to initiate contact with a single employee beyond those present at the three organizational meetings.") See also *Macomb Pottery Co.*, 175 NLRB 756 (1969) (employee never had contact with union organizers (who failed to visit the plant). Her only contact was with the alleged agent, who indicated to her that she could rely on him for information about the campaign. As her only contact with the union, the employee reasonably believed the alleged agent to be the union's representative.)

Because I conclude that employee Adam Price is not an agent of the Petitioner, his alleged objectionable conduct is not attributable to the Petitioner. Therefore, I will examine his alleged conduct using the Board's standards for third-party conduct. *Cornell Forge Co.*, 339 NLRB 733 (2003).

Objection 1:[2] Price threatened that he would slash the tires of any individual who did not vote for the Petitioner.

The Hearing Officer found that this statement, if made, occurred outside the critical period and therefore is not objectionable. The Petition was filed November 14. The statement was allegedly made by Price during a party at employee Jennifer Miles' house. The Hearing Officer made a credibility determination that this party occurred on November 11, before the Petition was filed. His determination was made, in part, on Price's testimony that he received a text message from Miles on November 11 inviting him to a bonfire at her house that night and Price's testimony that this was the only time he went to Miles' house for a social gathering. Price's testimony regarding the date of the text message was unrefuted.

The Hearing Officer found that the authorization cards were signed on November 8. The Employer contends that the cards were signed on November 13, that the party was for card signers, and therefore the party had to have occurred the weekend after the card signing and therefore within the critical period. Contrary to the Employer, I find that the date of card signing does not require a finding that the party necessarily occurred afterwards. It is uncontradicted in the record that Price contacted the Petitioner and spoke to his coworkers regarding the Petitioner before employees signed authorization cards. It is just as likely that the party was intended to be a coming together of those employees who intended to sign cards as it was intended to be a

[2] Although the Employer has excepted to some of the hearing officer's credibility resolutions regarding Objections 1, 2, and 3, the Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the reviewer that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). I have carefully examined the record and find no basis for reversing the findings.

coming together of employees who had signed cards. What is not disputed is the date Price received a text message from Miles inviting him to her house for a bonfire that night, November 11.

The Employer, as the party claiming the conduct is objectionable, has the burden of proving that the alleged statement was made during the critical period. I find that the Employer has not sustained its burden. Therefore, the alleged threat, having been made outside of the critical period, is not grounds for setting aside the election. See *Ideal Electric & Mfg. Co.,* 134 NLRB 1275, 1278 (1961) (holding that "in all the circumstances, that the date of filing of the petition...should be the cutoff time in considering alleged objectionable conduct in contested cases.").

Objection 2: Price offered to pay an employee $100 if she voted for the Petitioner.

The Hearing Officer credited Price's version of this conversation. Price testified that around the time that the authorization cards were signed, Price offered to lend employee Joanna Durlin $100. I find that such conduct is not objectionable. The cases cited by the Employer are not instructive in this regard. In *Tio Pepe, Inc.* 263 NLRB 1165, 1165 n. 4 (1982), the Board, pursuant to a remand from the Fourth Circuit, noted, "[In a]ccepting the court's holding as the law of the case, we are required to find that the captains, whether they are supervisors within the meaning of the Act or rank-and-file employees, made offers of financial benefit in exchange for union support and so engaged in objectionable conduct requiring that the results of the election be set aside." Such a holding, based on instruction from the Fourth Circuit, holds no precedential value in the instant case. In *NLRB v. Savair Manufacturing Co.,* 414 U.S. 270, 278 (1973), the Supreme Court concluded that *a union's* offer to waive initiation fees for only those employees who signed authorization cards before the election impaired employee's free choice and constituted objectionable conduct.

Objection 3: Price and Myers engaged in repeatedly unwelcome, intrusive, harassing, and intimidating text messages, phone calls, and visits to employee homes.

The question presented to me is whether the contact Price (as a third party) and Myers (as an agent of the Petitioner) had with employees Miles and Durlin (through text messages, phone calls, and visits) constitutes objectionable conduct. It is uncontradicted in the record that neither Price nor Myers was aware that their contact with Miles and Durlin became unwelcome. Whether Miles or Durlin perceived the contact as unwelcome is not instructive to whether the contact itself was objectionable. The Board has long held that the subjective reactions of employees are irrelevant to the question of whether there was in fact objectionable conduct. *Hopkins Nursing Center,* 309 NLRB 958, 958 (1992). Instead, the question is an objective one – whether the conduct has a tendency to interfere with employee free choice. *Id.* I find that the test is not met here given the ordinary nature of the communications and the active participation of each employee in the communications. Specifically, in reviewing the text messages, I find

nothing incredible or unusual about the communications that would not be found in countless other organizing campaigns. Therefore and contrary to the Employer, I do not find the contact to be objectively intrusive, intimidating, or harassing. For these reasons, I agree with the Hearing Officer and overrule this objection.

Objections 4-7: Respondent objected to the following conduct allegedly engaged in by Price: Price made knowingly false and deceptive statements to voters that if they sought revocation of their union authorization card, they would be discharged by the Employer; Price unlawfully promised a promotion or pay raise to a voter; Price frequented the Employer's location in order to intimidate and influence the bargaining unit; and during the polling periods, Price monitored and surveilled the polling area from the parking lot and campaigned to employees that were entering the store to vote.

The Employer excepted only to the Hearing Officer's determination that Price was not an agent of the Petitioner and the Hearing Officer's failure to apply the agency standard to the conduct alleged in these objections. For the reasons addressed above, I agree with the Hearing Officer's determination that Price was not acting as an agent of the Petitioner and I reject the Employer's exceptions.

Objection 8: Based on the totality of the circumstances, Price and/or the Petitioner unlawfully interfered with the election.

For the reasons set forth in the hearing officer's report, I agree with his recommendations to overrule this objection. In agreeing with the Hearing Officer's recommendations, I have carefully scrutinized the objections raised by the Employer and considered the closeness of the election results and size of the bargaining unit.

Cases cited by the Employer provide guidance but its reliance on these cases is misplaced because the Board has not held that the closeness of an election or the small size of a unit to be a factor in determining whether there is misconduct as a threshold matter. In other words, there must be a finding of misconduct (e.g. interrogation or threats) before considering the effect the closeness of a vote or the size of a voting unit had on employees' ability to have a fair and free election. In *Robert Orr-Sysco Food Services,* 338 NLRB 614 (2002), the hearing officer, as a threshold matter, found a number of serious threats were made during the critical period but did not find the conduct to be objectionable. The Board, in reviewing the threats, considered their effect in light of the closeness of the election results and found them to be sufficiently aggravated to create a general atmosphere of fear and reprisal. In *Cambridge Tool & Mfg. Co., Inc.,* 316 NLRB 716 (1995), the hearing officer similarly found instances of misconduct (interrogation, threats and disparate application of rules) as a threshold matter. In considering the effect of the misconduct, the Board examined the closeness of the election results. See also, *Kona 60 Minute Photo,* 277 NLRB 867, 870 (1985) (considering effect that serious threats made by high levels of management had on a small unit). Where, as here, the Hearing Officer did not find any threats or

other misconduct during the critical period, he did not have to reach the question regarding whether the conduct was sufficiently aggravated in light of the closeness of the vote or small size of the voting unit.

Objection on Reopened Record: Alleged Witness Tampering

The Employer's objection appears to be based only on the effect that Price's comments while sequestered had on his credibility. After reviewing the entirety of the record as a whole, I agree with the Hearing Officer's findings that the conversations, which appear to concern the witnesses' understanding of the Hearing Officer's sequestration order, are not sufficient to undermine Price's credibility.

II. CONCLUSION

Based on the above and having carefully reviewed the entire record, the Hearing Officer's report and recommendations, and the exceptions and arguments made by the Employer, I overrule the objections, and I shall certify the Petitioner as the representative of the appropriate bargaining unit.

III. CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for United Food & Commercial Workers, Local 655, and that it is the exclusive representative of all the employees in the following bargaining unit:

> All full-time and regular part-time Lead Sales Associates and Sales Associates employed by the Employer at its 525 East Harrison Street, Auxvasse, MO 65231 facility, EXCLUDING office clerical employees, managers, supervisors, temporary employees, confidential employees and professional employees as defined in the Act.

IV. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by **April 6, 2018.** If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board,

1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: March 23, 2018

/s/ Mary J. Tobey
Mary J. Tobey
Acting Regional Director, Region 14

EXHIBIT B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

Dolgencorp, LLC

Employer

and **Case 14-RC-209845**

United Food & Commercial Workers, Local 655

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

On December 8, 2017[1], an agent of Region 14 conducted an election among certain employees of the Employer. A majority of employees casting ballots in the election voted in favor of representation by the Petitioner (Union). However, the Employer contests the results of the election claiming that agents of the Union engaged in conduct warranting setting aside the election and conducting a new election. Specifically, the Employer contends that during the critical period, agents of the Union or employee supporters of the Union, unlawfully threatened and coerced eligible voters. The Employer also contends that during this period that agents of the Union interfered with the election by making false and deceptive statements and by making unlawful promises to eligible voters. The Employer further contends that agents of the Union or employee supporters engaged in electioneering and unlawfully interfered with the conduct of the election by creating an atmosphere of fear and coercion and interfered with laboratory conditions necessary to conduct a fair and free election.

After conducting the hearing and carefully reviewing the evidence as well as arguments made by the parties, I conclude that the Employer has failed to prove that individuals involved in the alleged objectionable conduct are agents of the Union. The conduct ascribed to the employee supporters of the Union does not rise to the level of objectionable conduct as it must be analyzed under the third party misconduct standard. Further, the alleged threat to slash the tires of any employee who voted no, even if it was made, was made outside the critical period.

After recounting the procedural history, I discuss the parties' burdens with regard to establishing an agency relationship, as well as the Board standard for setting aside elections when alleged misconduct is by individuals who are not agents of the party charged with objectionable conduct. Next, I briefly describe the Employer's operation and finally, I discuss each objection including credibility determinations.

PROCEDURAL HISTORY

The Union filed the petition on November 14. The parties agreed to the terms of an election and the Region approved their agreement on November 24. The election was held on

[1] All dates are 2017 unless otherwise stated.

December 8. The employees in the following unit voted on whether they wished to be represented by the Union:

> All full-time and regular part-time Lead Sales Associates and Sales Associates employed by the Employer at its 525 East Harrison Street, Auxvasse, MO 65231 facility, EXCLUDING office clerical employees, managers, supervisors, temporary employees, confidential employees and professional employees as defined in the Act.

The ballots were counted and a tally of ballots was provided to the parties. The tally of ballots shows that 4 ballots were cast for the Union, and that 2 ballots were cast against representation. There were no challenged ballots. Thus, a majority of the valid ballots were cast in favor of representation by the Union.

On December 14, the Employer filed timely objections. The Regional Director for Region 14 ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections. As the hearing officer designated to conduct the hearing and to recommend to the Board whether the Employer's objections warrant setting aside the election, I heard testimony and received into evidence relevant documents on January 3, 2018. The parties were permitted to file briefs. Both parties filed briefs which were fully considered.

By email received on January 10, 2018, the Employer requested consideration of alleged misconduct occurring during and immediately after the January 3, 2018 hearing. Based on this request, on January 10, the Acting Regional Director ordered re-opening of the record and issued a notice of re-opening of the hearing solely for the purpose of obtaining evidence on the alleged misconduct during and after the January 3 hearing. The record was reopened on February 1, 2018.

THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR ESTABLISHING AGENCY STATUS

Legal Standard for Agency Status

The burden of proving an agency relationship rests with the party asserting its existence, both as to the existence of the relationship and as to the nature and extent of the agent's authority. *Millard Processing Services*, 304 NLRB 770, 771 (1991); *Sunset Line & Twine Co.*, 79 NLRB 1487, 1508 (1948). The agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). An individual can be a party's agent if the individual has either actual or apparent authority to act on behalf of the party.

The Board applies common law principles of agency in determining whether an employee is acting with apparent authority when the employee makes a particular statement or takes a particular action. *Cooper Industries*, 328 NLRB 145 (1999). Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the

principal has authorized the alleged agent to perform the acts in question. Millard Processing Services, supra. Two conditions must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to the third party; and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. Id.

The Board has found employees to be union agents where there are numerous and substantial indicia of union authority. In *Bio-Medical of Puerto Rico,* 269 NLRB 827 (1984), employees were found to be agents of the union where they campaigned for the union at facilities other than where they were employed, introduced themselves as union representatives in the presence of union organizers, accompanied union organizers to representation proceedings held before the Board, spoke on behalf of the union at meetings and attended the pre-election conference. The Board concluded that the union held the employees out as apparent agents by permitting them to speak on behalf of the union at meetings, by permitting them to make special appearances with union officials at official election functions and by transporting them to another employer facility to campaign and vote on the day of the election. Id at 828. See also, *Pastoor Bros. Co.*, 223 NLRB 451(1976) (employee committee members were agents where they arranged and conducted two meetings at the union hall during which they spoke authoritatively on elections issues, served as election observers and drafted a handout signed by committee members which was reproduced for distribution by a union business agent after review by union's legal counsel). Agency status, however, is not conferred on an individual simply because that individual supports the union. The Board has found that agency status is not established merely on the basis that employees are engaged in "vocal and active union support." *United Builders Supply Co.*, 287 NLRB 1364, 1365(1988); see also *Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 291 (7th Cir. 1983). Here, the Employer has failed to meet its burden in demonstrating that employee Adam Price was an agent of the Union. The Employer failed to show that Price was vested with any authority to act on the behalf of the Union or that any employee reasonably believed this authority to exist. The only actions on the part of Price which separated him from any other employee union supporters were that he was the employee that initially contacted the union, and he handed out a survey to other employees designed to indicate which issues were important to them in the event of collective bargaining. These actions do not elevate Price to the role of an agent of the Union.

Legal Standard for Setting Aside Election based on Third Party Conduct

As further discussed below, because I have concluded that employee Price was not an agent of the Union, Price's alleged objectionable conduct is not attributable to the Union. Therefore, I have examined the alleged objectionable conduct using the Board's standards for third-party conduct. *Cornell Forge Co.*, 339 NLRB 733 (2003). It is well settled that where the challenged conduct is committed by nonagent employees, it is evaluated under the third-party standard. Under this standard, the objecting party must establish that the third-party conduct during the election was so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible. *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).

Further "[c]ourts are hesitant to overturn elections when statements cannot be attributed to the union because 'there generally is less likelihood that they affected the outcome.'" *NLRB v. Eskimo Radiator Mfg. Co.*, 688 F.2d 1315, 1319 (9th Cir. 1982), quoting *NLRB v. Mike Yurosek & Sons*, 597 F.2d 661, 663 (9th Cir.), cert. denied 444 U.S. 839 (1979). In addition, inasmuch as a union (or an employer) cannot control nonagents, there are equities that militate against taking away an election victory because of conduct by a nonagent. Also, detailed below, the record established the most egregious statement attributed to nonagent Price was made outside of the critical period and therefore cannot be utilized in determining whether or not to overturn the election.

THE EMPLOYER'S OPERATION

The Employer is engaged in the retail sale of food, snacks, health and beauty aids, cleaning supplies, family apparel, housewares, and seasonal items at its Auxvasse, Missouri facility. There are approximately 6 eligible voters at this facility.

THE EMPLOYER'S OBJECTIONS AND MY RECOMMENDATIONS

The order directing hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular testimony by witnesses that is consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested. Omitted testimony or evidence is either irrelevant or cumulative. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of the objection related to the witnesses' testimony.

Objection 1: During the critical period, Adam Price unlawfully threatened and coerced eligible voters by threatening to slash the tires of anyone that did not vote in favor of the union.

Record Evidence

The Employer argues that employee Adam Price threatened to slash the tires of anyone that voted against union representation. At Hearing, the Employer presented Human Resources Vice-President Kathleen Reardon who credibly testified that on December 4, employee Jennifer Miles approached her and asked her the procedure she needed to follow to pull her authorization card. In this conversation, Miles told Reardon that if Price found out what she was doing he would slash her tires. Because of her fear of retaliation, Miles stated instead of asking for her card to be pulled, she would simply vote no.

Employer Exhibit 3 is a statement prepared by employee Miles and given to Reardon on December 9, the day following the election. The statement contains the same threat that Price would slash the tires of anyone who voted no. Reardon testified that after the conclusion of the

voting session, she immediately exited the store and spoke to Director of Organizing, Billy Myers, concerning interviews being conducted by local media. She then returned to the store to find employee Joanna Durlin crying and visibly upset. Durlin stated both her and co-worker Jennifer Miles both wanted to change their vote. Durlin stated she "felt pressured" into voting yes. Both Durlin and Miles asked for privacy and were allowed access to the back receiving room.

While in the receiving room, Miles once again stated she felt compelled to vote yes from the "constant pressure" from employee Price and organizer Myers. Miles reiterated the threat from Price. Durlin also stated that she was promised $100 to vote yes, which will be discussed below with respect to Objection 2. Reardon asked each employee to write a statement.

Jennifer Miles testified that at one time leading up to the election, she invited co-workers to her house. This was to be a "coming together party of people that signed cards". Miles testified that Price came to the party and, while intoxicated, said, "If anyone decides to vote no instead of yes, I will slash their tires". At the time of this comment, only Miles and Price's brother were present. Miles could not provide an exact date for when this statement was made. She initially stated this occurred one to two weeks prior to the election. Miles narrowed this time frame down to between November 24 and December 1. When testimony revealed Miles volunteered to serve as the Union observer on November 27, she was asked if this comment was made before or after this. She testified it was after this. Miles could not recall what was said leading up to this comment, what Price said after the comment, or how she responded other than stating she thought she did not say a lot and then cut the evening short.

The Union presented Adam Price who credibly denied making these threats. Price was able to pinpoint the exact date he was invited over to employee Miles' house for the party and put this at November 11. Price testified he received a text from Miles stating to come on over that she was having a bonfire.

For a variety of reasons, I credit the testimony of Price over that of Miles. First, Miles' testimony was very general and vague. She could not recall the context of Price's threat or her response to the threat. Miles could not recall when the threat was made and could only offer a general timeline. Miles believed, at first, the statement to have been made "maybe two weeks" before the election. Then she testified that she believed the statement was made after she agreed to serve as the Union observer on November 27. The Thanksgiving holiday occurred on Thursday, November 23, and yet Miles was not able to use this holiday to pin down the date of this troubling threat. Another important date is when Miles volunteered to serve as the union observer. The record established this occurred on November 27. Eventually Miles testified she believed the statement was made after this. Again, Miles was unable to establish the exact date of her party, and the date when this alleged threat was made, in relation to the date she volunteered to be an observer. It is un-contradicted Price's alleged threat was made on an evening she invited co-workers to her home to have a "coming together party for people that signed cards". This is relevant for two reasons. First, this distinguishes this from a statement made on a non-descript work day that would easily blend in with many others. It may be

difficult to pin down an exact date if this were the case. However, this was made on a date she invited employees to her house. It would seem fairly easy to look at a calendar and recall the date this occurred. Secondly, it would appear more likely that a coming together party for people that signed cards would occur much closer to the time they signed cards on November 8, not a month or so after.

Conversely, employee Adam Price was able to credibly testify that the evening in question in which he was invited over to Miles' house was November 11. Price was able to pinpoint this date by examining his text messages and to find the message sent to him by Miles inviting him over for a bonfire and seeing this was sent on November 11. As cards were signed on November 8, it would make more sense that a party for "card signers" would happen a few days after cards were signed.

Second, I credit Price over Miles based on my observations of their demeanor at the hearing. Price appeared to exhibit a calm and self-assured demeanor. He answered questions from both counsel in a deliberate and non-evasive manner. Conversely, Miles was much more evasive, vague, and on occasion argumentative with opposing counsel. This came through when questioned on her failure to block "harassing" text messages. Miles refused to admit she frequently participated in these groups texts in spite of the record showing otherwise. A rough count of texts sent by her as compared to other employees showed she sent around 54 texts compared to 34 by employee Durlin and 26 by employee Price. It is not clear how she could label this as infrequent when it was more than any other employee. Miles also became argumentative with opposing counsel when asked if she knew how to block the group text, a fair question given that Miles claimed the texts were harassing, and asked opposing counsel if the question was intended as sarcasm before she acknowledged she did know how to block texts.

Analysis and Recommendation

I recommend Objection 1 be overruled.

The Board has consistently held that it will not entertain objections to an election which occur prior to the commencement of the pre-election critical period. *Ideal Electric Co.* 134 NLRB 1275 (1961).[2] The critical period begins on the date the petition is filed, and extends through the election. *Goodyear Tire and Rubber Company*, 138 NLRB 453 (1962). Extant Board law clearly identifies the Employer's burden of establishing that the alleged conduct occurred within the critical period, and had the tendency to affect the outcome of the election.

[2] See Report on Objections and Notice of Hearing fn. 3, "The petition was filed on June 26, 2013. I will consider on its merits only that alleged interference which occurred during the critical period which begins on and includes the date of the filing of the petition and extends through the election. *Goodyear Tire and Rubber Company*, 138 NLRB 453 (1962)."

Therefore, for purposes of this inquiry it is not so much necessary to credit or discredit Miles testimony in terms of the statement made because *even if it was made,* it was outside of the critical period. Price testified in a truthful manner that the event in which the statement was made occurred on November 8. Miles could not rebut this testimony because she could not pinpoint the date the statement was made. There is no reason to not establish the date of this event and thus when the comment may or may not have been made as November 8, outside of the critical period. Accordingly, the statement Price allegedly made, assuming it was made, about slashing tires cannot be utilized in setting aside the election.

Objection 2: During the critical period, Adam Price unlawfully interfered with the conduct of the election by offering to pay $100 to any employee who voted for the union.

Record Evidence

Employee Joanna Durlin testified that employee Adam Price offered her $100 to vote "yes" multiple times. In her testimony, she states that the first time Price offered her $100 to vote yes was at the store, though she could not remember the date. She states in her testimony that he offered her $100 again at the store and in the same answer states the second time he offered it was at her house. This is obviously confusing as this would make the third time he offered $100 to her to vote yes. This occasion, whether the second or third, she recalled was Thanksgiving. She testified that Price said he would bring it to her the next day. Durlin never received the money, never asked for the money, never reported this to the Union, and never reported it to the Employer until after the election.

Price testified that after the employees had their hours cut, he had a conversation with Durlin in which she was crying and stating she did not know what to do and was "freaking out". Price testified he attempted to calm her and in doing so said he could help her with the money and loan her $100. This conversation was placed around the time he contacted the Union.

As with Objection 1 above, I credit the testimony of Price. I make this credibility determination for a number of reasons. First, Price's version of the events is more probable. Durlin made no secret of the fact that she was struggling financially. At the time her hours were cut, she was going through the process of getting a divorce and was raising two children with no assistance from her husband. She was working three jobs and was counting on the money she earned at Dollar General to cover her legal fees. Price's version is also consistent with the testimony of employee Miles who stated Price mentioned he offered Durlin the money because he did not want her to quit, that if she needed help, he would give her $100, and that they needed her vote. Even in Miles' version, Miles does not state Price offered the $100 based on how Durlin would vote, or only for her vote. Finally, there is no evidence that Price would have had to bribe Durlin for a yes vote. She was a card signer and participated in the group texts.

Second, Durlin's testimony, as noted above, was internally inconsistent. She could not clearly state whether she was offered money two or three times, or whether she was offered

money twice in the store or once in the store and once at her house, or twice at the store and once at her house.

Third, I based my credibility determinations on my observations of the demeanor of the witnesses. During her testimony, Durlin appeared nervous and anxious. Also, while she did not cry while on the stand, she brought with her tissues almost as though she was prepared for it. Also, during a portion of her testimony in which she was asked if anyone told her she would get a better position with the Union if she supported the Union, Durlin glanced at Employer Exhibit 4, which was her previously written statement, before answering, which is evasive.

Analysis and Recommendation

I recommend overruling Objection 2.

While the Employer's Objection states that during the critical period, Price offered to pay "any" employee $100 who voted for the union, at no time was Price actually alleged to offer "any" employee $100. The Objection would appear to be more accurately limited to one employee, Joanna Durlin. Further, there was no stated reason Price would have felt the need to offer her $100 to vote yes more than any of the other two card signers.

I base my determination on my creditability resolution and crediting the testimony of Price that the context of offering $100 was not contingent on voting yes in the upcoming election.

Objection 3: During the critical period, employees were subject to harassment including text messaging and intimidating visits by employee Adam Price and Union organizer Billy Myers.

Record Evidence

Employee Jennifer Miles testified pertaining to the group text chat that included her, Adam Price, Joanna Durlin, and Director of Organizer Billy Myers. A print out of the text messages was introduced as Union Exhibit 1. The messages began on November 17 and went through the election on December 8. In sum, the participants discussed employment issues at the store, planning times to meet in person, and issues pertaining to the election, as well as general small talk. Miles testified that at first the texts were welcome, but later it became a nuisance. She went on to state that she started to respond not as much and that she felt compelled to respond.

On cross examination, Miles testified she voluntarily participated, but only when messages were sent to her. She was asked if she sent many replies back and she testified "no, not very many". She did acknowledge that she voluntarily provided her phone number to organizer Billy Myers and that she did know how to block texts and did not do so.

In hearing, employee Durlin was asked what exactly made her feel pressured in terms of how to cast her vote. She recanted that there were a lot of text messages back and forth. Later she testified that these text messages were received daily. During this testimony, she also mentioned that organizer Billy Myers and employee Adam Price showed up to her house and talked to her about the Union. She stated she was willing to listen and actually signed a card..

Analysis and Recommendation

I recommend overruling Objection 3

Both employee Miles and Durlin both acknowledged that they never told organizer Myers, or employee Price, to stop texting them. Miles and Durlin both acknowledged they never attempted to block Myers' or Price's texts. At a minimum, I would find this would be a necessary step in showing something to be harassing.

Further, I do not credit the testimony of either Mile or Durlin with respect to this objection. Their testimony was untruthful at worse; self-serving at best. Miles' testimony was contradicted by record evidence. Miles testified she participated in the group texts but only when messages were sent to her. Union Exhibit 1 clearly shows Miles did much more than this. Namely, on December 6 she was the first one on the group text to text, sending a text stating, "Good morning everyone! Hopefully we can all get together today". Not only did she initiate the text, but the message furthered her participation in the group and purpose of the group by stating she was hopeful they could get together. Of course, this also contradicts her testimony that at first the texts were welcome, but later they became a nuisance. Her text was sent on December 6, only two days before the election.

Not only did Miles do nothing to express that the texts were unwanted, the record evidence establishes she did quite the opposite. Miles sent a text on December 6 that can be best described as a "pro-union" text detailing how wages have not kept pace with the costs of living. Her own comment, which accompanied this text was "Lookie what I found on Facebook. How accurate is this?" In the context of the circumstances this could be taken no other way as an invitation to fight for higher wages or at least to solicit thoughts on the issue. Miles' testimony with respect to the number of texts she responded to is also contradicted by record evidence. Miles was asked how many texts she sent back and she responded "not very many". A rough count of the text messages sent in this 21 day period between November 17, when the texts commenced, and December 8, the day of the election and day the text messaging ended, revealed Price sent roughly 26 texts, Durlin 34, Myers 44, and Miles 54. Miles sent more texts than any of the others which contradicts her testimony that she did not respond to many texts. While Miles testified that she felt compelled to remain a member of the group to avoid giving the appearance of not supporting the Union, this does not adequately explain why she would initiate text messages that call for group meetings, or text more frequently than anyone else in the group.

The same can be said of Durlin's testimony. She testified she felt harassed as text messages were received "daily". Union Exhibit 1, being a complete record of all text messages sent by the

group in the 21 day span, shows texts were sent on only 8 of the 21 days. This is not "daily". Further, she herself initiated the text conversation on one of the eight days as Miles did on one other. Thus, the Employer failed to establish the text messages were harassing or rose to the level of conduct warranting setting aside the election.

Objection 4: During the critical period, employees were falsely misled and threatened with discharge if they asked to revoke their union authorization card.

Record Evidence

Joanna Durlin testified that on multiple occasions, no specific dates that she could recall, that employee Price stated that the Employer would terminate them if they attempted to revoke their union authorization cards. Durlin testified she took Price's comments so seriously that it prevented her from attempting to pull her card. There was no testimony that any statements of this nature originated from union organizer Myers, but only from employee Price. Further, only employee Durlin testified to the threat of termination. Price denied making any threat of termination. It is not necessary for me to make a credibility finding because even assuming Price made the statement, it is not objectionable conduct as noted below.

Analysis and Recommendation

I recommend overruling Objection 4

In cases of alleged campaign misrepresentations, the Board applies the longstanding *Midland* standard under which it will not probe into the truth or falsity of the parties' campaign statements and will not set aside an election on the basis of misleading statements unless "a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982). The *Midland* standard is premised on a "view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." Id. at 132, quoting *Shopping Kart Food Market, Inc.*, 228 NLRB 1311, 1313 (1977). *Midland* adopts a "clear, realistic rule of easy application which lends itself to definite, predictable, and speedy results" and "removes impediments to free speech by permitting parties to speak without fear that inadvertent errors will provide the basis for endless delay or overturned elections" Id. The Sixth Circuit Court of Appeals endorsed the *Midland* approach, but carved out a narrow exception requiring an election to be set aside, even if no forgery is involved, "where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth." *Van Dorn Plastic Machinery, Inc. v. NLRB*, 987 F.2d 359, 365 (6thCir, 1993) (explaining that *Van Dorn* is a "narrow" limitation on *Midland*). The Board also evaluates alleged misstatements according to the standard set forth in *Van Dorn* as well as the *Midland* standard. See, e.g., *U-Haul of Nevada,*

Inc., 341 NLRB 195 (2004) (Union's document guaranteeing that it was illegal for the company to close or threaten to close the plant if the union won the election not objectionable under *Midland* or *Van Dorn*). "In other words, the Board will not set aside an election because of the substance of the representation, but may do so because of the deceptive manner in which it was made, a manner that renders employees unable to evaluate a forgery for what it is." Id at 195.

In the instant case, there was no misrepresentation by the Union at all. Here, we are dealing with statements made by a third party employee. Since Price was not an agent of the Union, the standards set forth above do not apply to his communications. If Price felt there was a danger in the Employer retaliating against employees who signed cards, he was certainly free to express that. Price was not authorized to speak on behalf of the Employer or the Union and could not say with any authority what actions the Employer would take if it was discovered who was interested in obtaining union representation. In a case such as this, it is up to the employees to forge their own opinion, not to simply accept a co-worker's view as an absolute.

Objection 5: During the critical period, Adam Price and the Union unlawfully offered an employee a promotion in exchange for voting in favor of union representation.

Record Evidence

Employee Joanna Durlin testified that employee Price was not interested in being a key holder/lead sales associate anymore and that after the Union vote, he would relinquish the position. As she was next in line in terms of seniority, she would get the position and the one dollar an hour raise which comes with it. Durlin did acknowledge that Price had mentioned to her prior to the union organizing drive that he did not like having the responsibility of being a key holder. Price did not testify regarding this objection.

Analysis and Recommendation

I recommend overruling Objection 5.

Assuming this statement was made, it was made by a co-worker, employee Price, not the Union or an agent of the Union. It is well settled that where the challenged conduct is committed by non-agent employees, it is evaluated under the third-party standard. Under this standard, the objecting party must establish that the third-party conduct during the election was so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible. *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). Further "[c]ourts are hesitant to overturn elections when statements cannot be attributed to the union because 'there generally is less likelihood that they affected the outcome.'" *NLRB v. Eskimo Radiator Mfg. Co.*, 688 F.2d 1315, 1319 (9th Cir. 1982), quoting *NLRB v. Mike Yurosek & Sons*, 597 F.2d 661, 663 (9th Cir.), cert. denied 444 U.S. 839 (1979). In addition, inasmuch as a union (or an employer) cannot control

non-agents, there are equities that militate against taking away an election victory because of conduct by a nonagent.

An employee expressing they are no longer interested in the position they currently hold is not objectionable. Nor is the statement that based on seniority, another employee would be next in line to receive the position if this was desired.

Objection 6: During the critical period employee, Adam Price frequently visited the store in an effort to intimidate and influence other members of the bargaining unit.

Objection 7: On the day of the election employee, Adam Price was lingering in the parking lot and encouraged other bargaining unit members to vote in favor of the union as they entered the store.

Record Evidence

As Objections 6 and 7 are closely related, they have been combined for this report.

Employee Adam Price was observed by Human Resources Vice-President Kathleen Reardon who testified she observed Price in the parking lot leading up to the voting session. Reardon received a text from an employee stating that Price approached her in the store and attempted to get her to vote yes. Price acknowledged showing up at the store to vote before the polls opened, making a purchase in the store and then leaving. Price testified he returned around 4:30 p.m. when employee Jennifer Miles requested he stop by to smoke and chit chat. After Price voted when the polls opened at 5:00 p.m., he left and did not return until the polls closed to be present for the counting of the ballots.

Analysis and Recommendation

I recommend overruling Objections 6 and 7.

Under the rule established in *Milchem, Inc.*, 170 NLRB 362, 362 (1968), an election will be set aside if a party to the election engages in prolonged conversation with prospective voters waiting in line to cast their ballots, regardless of the content of that conversation. Thus, the *Milchem* rule requires: (1) conduct by or attributable to a party that (2) involves prolonged conversations with (3) employees waiting in line to vote. *Crestwood Convalescent Hospital,* 316 NLRB 1057, 1057 (1995). Since the conduct alleged here involves an employee who is not to an agent, the *Milchem* rule does not apply. Instead, the test set forth in *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1119 (1982), enfd. 703 F.2d 876 (5thCir. 1983), will apply. In that case, the Board set out a series of factors to be considered in electioneering cases, including: (1) the nature and extent of electioneering, (2) whether it was conducted by a party or by employees, (3) whether the conduct occurred in a designated no-electioneering area, and (4) whether the conduct was contrary to the instructions of a Board agent. Id. In *Hollingsworth Management*

Service, 342 NLRB 556, 558 (2004), the Board set aside an election under the standard governing third party electioneering, but noted that the electioneering was done by a group of individuals who came to the voting area for the apparent purpose of systematically targeting voters and involved "serious acts of physical coercion."

Simple campaigning by employees, or attempting to organize employees, is not grounds to set aside an election. *Rheem Manufacturing Co.*, 309 NLRB 459, (1992). In *Rheem*, the Board did not set aside an election when an employee wearing a union t-shirt spent substantial periods of time talking to employees and loudly encouraging employees to vote for the petitioner union as they entered the polling area. Here, the behavior attributed to Price is not nearly on par with this.

The Board distinguished its decision in *Rheem* where members of the union's organizing committee campaigned immediately outside the voting place. The Board held that even assuming the third party conduct occurred in a no-electioneering area, it was not so coercive or disruptive as to impair employees' free choice. Id. at 463. In *Crestwood Convalescent Hospital*, 316 NLRB 1057, 1057 (1995), two union supporters walked among about 25 employees and talked to them as they waited in line to vote. The Board found that their actions did not substantially impair employees' free choice. Id. The Board distinguished *PepsiCola Bottling Co.*, 291 NLRB 578 (1988), wherein it found election interference because voters had to pass through a "gauntlet" of chanting and cheering pro-union supporters en route to the polling place. Id.

Based on the testimony provided at hearing, the Employer has not met its burden in proving that Prices' behavior rose to a prohibited level which would create a general atmosphere of fear rendering a free and fair election impossible. Price was not observed lingering in the immediate election area. He was observed in the parking lot. This is a far cry from monitoring and surveilling or intimidating. While in the store, Price made a purchase and mentioned to an employee that he thought she should vote yes. This is within his rights to do so and is not sufficient, under the above case-law, to warrant setting the election aside

Objection 8: Laboratory conditions were interfered with through threats of violence, inducement and payments to vote in favor of union representation, repeated and unwanted harassment, threats of retaliation, electioneering and surveillance resulting in the election being not free and fair.

Record Evidence

This objection seems intended as more of a catch all as there are no new allegations contained that were not in Objections 1 through 7. The Employer offered no specific evidence to this objection.

Analysis and Recommendation

I recommend overruling Objection 8. As noted, the Employer did not present any additional conduct for this Objection that has not already been addressed above. I have recommended overruling Objections 1 through 7, so I am recommending this Objection be overruled for the same reasons I overruled those Objections.

Conduct Occurring During the Initial Hearing

While not alleged as a separate objection, the Employer requested a second hearing for the purpose of introducing conduct by employee Adam Price that occurred during the hearing. This conduct cannot be objectionable conduct because it occurred after the election. The Employer essentially contends Price violated the sequestration order in the January 3 hearing. The Employer contends Price's conduct reflects on his credibility and should be considered in making the determinations on the Employer's 8 Objections.

Record Evidence

On February 1, the record was reopened and the Employer was given the opportunity to present evidence supporting its contention that Adam Price intimidated witnesses during the Hearing held on January 3. In the January 3 hearing, I ordered the sequestration of witnesses. My sequestration order stated:

> No witness may discuss with other potential witnesses testimony that they have given or intend to give. The best way to avoid any problems is simply not to discuss a case with any other potential witnesses until after the hearing is closed.

I instructed the counsel of both parties to inform potential witnesses of their obligations under the order.

During the second hearing, employee Joanna Durlin testified that on "multiple" occasions during the Hearing, Price mentioned that he would gain access to her testimony. Durlin testified that these comments were made once before, and once after, she provided testimony. The comments were not made directly to her; rather Price was engaged in a conversation with co-worker Alan Bloom who was also subpoenaed to appear at the Hearing.

Durlin testified that Price stated that the sequestration rule was futile as he would get the transcript from the Union anyhow and see others' testimony. The record established this comment was made in a conversation Price was having with Bloom while Durlin was seated approximately 15 feet away on the opposite side of the lobby waiting area. Price recalls discussing the matter once, while Durlin states it was discussed twice.

The Employer argued Price was attempting to intimidate Durlin, as he attempted to intimidate Miles previously with the comment regarding slashing the tires of anyone who voted

no. Durlin testified that her testimony was not changed because of this comment and that she really did not think about whether the testimony would be made public or not. She acknowledged that union organizer Billy Myers was present in the Hearing room during her testimony.

Analysis

The Employer requested the evidence brought forth regarding the comments Price made at the Hearing on January 3 be taken into account. I have taken the evidence into account and I conclude Price did not violate the sequestration order and his conduct with respect to the sequestration order does not change my recommendations on the Employer's objections. The point of a sequestration order is not to keep testimony private. The purpose is to prevent one witness from hearing the testimony of another so as to reduce the risk of fabrication, collusion, and inaccuracy. See *Gossen Company*, 254 NLRB 339, 343 (1981). The fact that Price had a conversation with a co-worker in which he mentioned that employees could read a transcript of the hearing does not violate the sequestration order There is no evidence his comments, not directed at Durlin, shaped any witnesses' testimony, or bolstered the testimony of any witness. Price's comments about reading the transcript are better characterized as a misunderstanding of the purposes of sequestration. Two employees were essentially complaining that I had not allowed them to be present in the hearing room and commenting at how this order made no sense in their eyes as they will eventually be able to see a transcript of the testimony. Durlin testified that she was not surprised that others could learn of her testimony after the conclusion of the hearing, nor should she have been. However, there is no evidence that Price, or any other witness, discussed his specific testimony with any other witness, or that any of the witnesses tailored their testimony to that of other witnesses. Thus, the Employer cannot show that a violation of the sequestration order occurred.

CONCLUSION

I recommend that the Employer's 8 Objections be overruled in their entirety. The Employer has failed to establish that the conduct by either employee Adam Price or Union organizer Billy Myers was so aggravated as to create a general atmosphere of fear making a free election impossible. Thus, there is insufficient evidence to set aside the election held on December 8. Therefore, I recommend that an appropriate certification issue.

APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 14 by February 22, 2018. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Regional Director, National Labor Relations Board, 1222 Spruce Street, Room 8.302, Saint Louis, Missouri, 63103.

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business, 4:30 p.m., on the due date. If E-Filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated: February 8, 2018

/s/ John Kelly Holderman
John Kelly Holderman
Hearing Officer

Case **14-RC-209845**

STATEMENT OF SERVICE

I hereby certify that I have this date served copies of the Hearing Officer's Report on Objections on all parties listed below by electronic mail.

Dated: February 8, 2018

/s/ John Kelly Holderman
John Kelly Holderman
Hearing Officer
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